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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND MICHAEL TENORIO,

Defendant and Appellant.

2d Crim. No. B220217
(Super. Ct. No. 2009012755)
(Ventura County)

A jury convicted Raymond Michael Tenorio of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)¹ The jury found him not guilty of elder abuse. (§ 368, subd. (b)(1).) The trial court granted probation. We strike the probation investigation fee. (§ 1203.1b.) In all other respects we affirm.

FACTS

In November 2008, Dennis O'Falahee (Dennis) was 67 years old. Dennis and his son, Doyle, were homeless and lived on the beach near the Santa Clara River.

On November 8, 2008, Dennis and Doyle were walking near the pier in Ventura. A homeless youth, Tyler Farris, rode up to them on a bicycle. Farris got off his bicycle, and told Doyle, "I'm going to kick your ass, bitch." He was joined by another

¹ All statutory references are to the Penal Code unless otherwise stated.

homeless youth, Josh Murphy. When Doyle said he was going to call the police, Farris, Murphy and several others in the area ran away. Tenorio watched from about 30 feet away. He did not say anything or participate.

On November 9, 2008, Doyle was talking to a group of people at the beach. The group included Tenorio and his brother, Jessie. When Farris and Murphy came into the area, Jessie told Doyle, "I think you have to go. You brought discord into the camp." Jessie said, "[T]here was some trouble that's going to come down."

Doyle left the group and walked to the bathroom. He met Dennis there, and both Doyle and Dennis entered the bathroom. Farris and Murphy entered after them. Murphy was armed with one knife and Farris was armed with two. Farris said, "Give it up, bitches." Dennis, who was using a cane for an injured knee, knocked one of the knives out Farris's hand with the cane. Dennis then pushed Farris into Murphy. Doyle and Dennis left the bathroom followed by Farris and Murphy. Tenorio was outside the bathroom.

Outside the bathroom Doyle and Farris immediately started to fight. Farris had Doyle pinned against the wall of the bathroom. Dennis warned Doyle that Farris had two knives, and encouraged Doyle to draw his own knife. Doyle did not draw his knife, but continued to fend off Farris with his fists. Farris stabbed Doyle in the chest, left arm and left leg. Doyle was able to pin Farris against the wall and stick his fingers in his eyes. Farris screamed, "My eyes, my eyes."

In the meantime, Dennis grabbed Murphy and threw him to the ground. He got on top of Murphy and punched him two or three times. Murphy had a knife, and Dennis did not want to be stabbed.

When Dennis threw Murphy to the ground he dropped his cane. Tenorio picked up the cane and repeatedly hit Dennis with it. During Tenorio's attack on Dennis, Murphy got up, ran over to Doyle, and stabbed him in the back. Murphy, Farris and Tenorio ran from the scene when they heard the sound of approaching sirens.

Defense

Gerald English was in the area on the day of the fight. English knew Tenorio through a girlfriend. English looked toward the restroom area and saw an old man repeatedly strike a teenager with a "stick." The teenager was on the ground and the old man was "swinging pretty big."

Tenorio came in and took the stick from the old man. The old man rushed at Tenorio. As Tenorio stepped back, he hit the old man with the stick several times. The old man stopped in his tracks, and Tenorio told the teenager to leave. Tenorio threw the stick and they all left.

DISCUSSION

I

Tenorio contends the trial court erred in admitting hearsay.

Doyle testified: On the day of the fight he was talking to a group of people at the beach. The group included Tenorio and his brother, Jessie. There was no problem until Farris and Murphy came into the area. Then Jessie told Doyle that Doyle had to leave because he brought discord into the camp. Jessie told Doyle, "[T]here was some trouble that's going to come down." Tenorio objected to the statement as hearsay, but the trial court overruled the objection.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) We review the trial court's ruling for an abuse of discretion. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1144.)

The Attorney General argues the statement is admissible under the contemporaneous statement exception to the hearsay rule. Evidence Code section 1241, subdivisions (a) and (b) provide: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement . . . [i]s offered to explain, qualify, or make understandable conduct of the declarant; and . . . [w]as made while the declarant was engaged in such conduct."

But the statement does not explain any conduct of Jessie, who was the declarant. The statement is not admissible under Evidence Code section 1241.

It was error for the trial court to overrule the hearsay objection. Tenorio argues that the error was prejudicial. He believes the statement, "[T]here was some trouble that's going to come down," shows not only that others besides Murphy and Farris planned to assault Doyle, but also that Tenorio's family members harbored such intentions.

But Jessie made the statement only after Murphy and Farris appeared in the area. Doyle testified that until then there was no problem. Clearly, Jessie knew there was going to be trouble between Jessie and Farris and Doyle. But the statement does not show Jessie knew others would be involved. Nor does it show Tenorio's family members harbored the intention to assault Doyle. That Tenorio, Jessie and Doyle were in a group without a problem until Murphy and Farris appeared, tends to show there was no preexisting animosity between Tenorio and Doyle. If anything, taken in context, the statement is exculpatory. There is no reasonable probability Tenorio would have achieved a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Tenorio contends he was prejudiced by the jury's consideration of an unadmitted transcript of his interview with the police.

After the defense witness English testified, the prosecutor stated her intent to offer rebuttal evidence. She wanted to impeach English's testimony about what he saw with statements Tenorio made during a police interview. Defense counsel had no objection because the transcript of the interview contained exculpatory evidence. Defense counsel argued that if any evidence of the interview was admitted the whole transcript should be admitted, except for references to Tenorio's probation. She argued reference to Tenorio's probation following a battery conviction should be redacted. The trial court agreed with defense counsel. Ultimately, the prosecutor decided not to offer the rebuttal evidence, and the police interview transcript was not admitted into evidence.

The unadmitted interview transcript was inadvertently given to the jury. The court and parties discovered the jury had the transcript when the jury requested a compact disk player to play the disk on which the interview was recorded. The court inquired of the jury, and the foreperson stated that four or five pages of the transcript had been read aloud to the jury. The court instructed the jury to disregard the transcript. After the jury retired to resume deliberations, the court informed the parties that the jury told the bailiff that the jury reached a verdict on one of the counts. About 15 to 20 minutes later, the jury reached a guilty verdict on count 1 and a not guilty verdict on count 2.

When a jury innocently considers evidence it was inadvertently given, the error is reversible only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Cooper* (1991) 53 Cal.3d 771, 836.)

Tenorio claims the jury's consideration of the transcript was prejudicial because it contains his admissions that he was drunk at the time of the incident and that he was on probation for battery. But the transcript also contains Tenorio's version of the events. That version is consistent with his defense at trial. In other words, Tenorio got his version of the events before the jury without the risk of submitting to cross-examination. On the whole, the transcript was more favorable than prejudicial.

Moreover, the trial court admonished the jury not to consider the transcript. We presume the jury followed the court's instructions. (*People v. Stitely* (2005) 35 Cal.4th 514, 559.)

Tenorio points out that the jury came back with a guilty verdict about 15 minutes after the trial court's admonishment. He argues that there is more than an abstract possibility the jury's sudden agreement was influenced by its exposure to the transcript.

The argument has a number of flaws. First, it assumes the jury was undecided on the guilty verdict. Prior to the trial court's admonition, the jury had reached a verdict on one of the counts. But the jury did not specify which count or whether the

verdict was guilty. The count on which the jury was undecided might well have been the second count, elder abuse, on which Tenorio was found not guilty.

Second, even assuming the jury found Tenorio guilty after the court's admonition, it does not show the guilty verdict was influenced by Tenorio's admissions in the transcript. This is not a case in which the jury received new prejudicial information and came back with a verdict 15 minutes later. The jury had already considered the transcript prior to the trial court's admonition. If the information contained in the transcript was so prejudicial as to lead to a guilty verdict within 15 minutes, the jury would already have reached that verdict. Instead, the jury was asking to play the recording of the interview. If anything, the more logical conclusion is that the trial court's admonition led to a quick verdict by preventing the jury from considering the exculpatory statements contained in the transcript, not because the transcript contained prejudicial information.

There is no reasonable probability Tenorio would have received a more favorable result had the transcript not been given to the jury.

III

Tenorio contends the trial court erred in failing to give a unanimity instruction.

Tenorio was charged with a single count of aiding and abetting an assault with a deadly weapon. He argues the count could be sustained either by Farris's stabbing of Doyle or Murphy's stabbing of Doyle. Tenorio claims the jury should have been instructed that it must unanimously agree on the act supporting the conviction.

When a violation is charged and the evidence establishes more than one act which could constitute the charged offense, either the state must select the particular act upon which it relies, or the jury must be instructed that it must unanimously agree on which act to base a guilty verdict. (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) The rule has a number of exceptions. Among the exceptions is the continuous-course-of-conduct exception, where the acts are so closely connected in time so as to form part of

one transaction. (*Ibid.*) Another exception is where the defendant offers the same defense to the various acts constituting the charged crime. (*Ibid.*)

The Attorney General argues this case falls within the continuous-course-of-conduct exception. Tenorio argues that for the continuous-course-of-conduct exception to apply, the defendant must offer the same defense to the various acts constituting the charged crime. (Citing *People v. Crandell* (1988) 46 Cal.3d 833, 875.) In *People v. Jennings, supra*, 50 Cal.4th, page 679, however, the court lists continuous course of conduct and same defense as separate exceptions.

In any event, both exceptions apply here. The two assaults on Doyle were so closely connected in time and had the same objective as to constitute a continuous course of conduct.

Tenorio argues, however, that each assault had a different defense. It may well be that Tenorio could have raised a separate defense to each assault, but he did not. Instead, his defense to both assaults was that he did not intend to aid Farris and Murphy in their assault on Doyle. He only acted to prevent Dennis from continuing his assault on Murphy.

On Appeal, Tenorio attempts to craft separate defenses out of portions of his counsel's closing argument. He points to argument that Tenorio did not act until Doyle had Farris pinned against the wall. He claims his counsel's point was that he could not be liable for Farris's actions. But when read in context, the point was simply that he did not intend to aid in any assault on Doyle. He acted solely to stop what appeared to be an assault by Dennis on Murphy.

Tenorio offered the same defense for both offenses. A unanimity instruction was not required.

IV

Tenorio argues that the cumulative effect of the errors was prejudicial.

But the hearsay statement did not show Tenorio or his brother were involved in a plan to attack Doyle. The transcript of Tenorio's interview with the police

was on balance more beneficial than prejudicial. The trial court did not err in failing to give the unanimity instruction. The cumulative effect was not prejudicial.

V

Tenorio contends the trial court failed to reweigh the evidence when it denied his motion for a new trial.

Tenorio moved for a new trial pursuant to section 1181, subdivision 6, on the ground that there is insufficient evidence to support the verdict. In deciding a motion for a new trial on the ground of insufficient evidence, the trial court must weigh the evidence independently. (*People v. Davis* (1995) 10 Cal.4th 463, 523.) The court is, however, guided by the presumption in favor of the correctness of the verdict. (*Id.* at p. 524.) We review the court's determination for an abuse of discretion. (*Ibid.*)

Here the trial court had a written motion containing the correct standard. But Tenorio relies on the trial court's comments at argument on the motion. The court concluded: "Well, I suppose that the easiest thing in the world to do with something like that is to either take it as a whole to stall [*sic*] or pick it apart in little pieces, and the jury could have done one -- could have done a little of each. [¶] There's an affinity between the defendant and the people who committed the other crime of some sorts, and he chose which side to join. The degree which he understood exactly what they were doing is not necessarily required -- it's not required the DA show exactly what method of infliction is going to be used. [¶] So I don't think I'm in a position to want to overturn the jury verdict and grant a new trial. Especially, the trial was actually -- both lawyers did a pretty good job of getting a very, very complex and confusing set of facts into some presentable package. These cases are really hard to get clear, and juries, very often in cases where there's confusion like this, just say the DA loses. They've got the burden. They didn't. They thought there was enough of the DA's theory. [¶] So I'm not going to grant the motion on that ground."

Tenorio believes that because the trial court focused its comments on the jury verdict, it did not independently weigh the evidence. But in independently weighing the evidence the trial court is guided by the presumption that the verdict is correct.

(*People v. Davis, supra*, 10 Cal.4th at p. 524.) It is not surprising that the trial court's comments focused on the verdict. The trial court was given the correct standard in the written motion. The trial court said nothing that shows it did not apply the standard properly.

VI

Finally, Tenorio contends the trial court abused its discretion in imposing a probation investigation fee pursuant to section 1203.1b. Because there is no evidence Tenorio had the ability to pay, the Attorney General concedes the point.

The probation investigation fee imposed pursuant to section 1203.1b is stricken. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

John E. Dobroth, Judge

Superior Court County of Ventura

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